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No. _____

In the Supreme Court of the United States

BRENTLEY COATES,

Petitioner,

v.

AGILENT TECHNOLOGIES and AGILENT TECHNOLOGIES, INC. DEFERRED PROFIT-SHARING PLAN, the HEWLETT-PACKARD COMPANY, and the HEWLETT-PACKARD COMPANY DEFERRED PROFIT-SHARING PLAN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether participants in individual account plans may obtain relief to the plan under section 502(a)(2) of ERISA when the alleged violations affected some, but not all, of the plan participants' accounts.

2. Whether a fiduciary has a duty under ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), to disregard the terms of the plan document where those terms require him to violate his fiduciary duties under ERISA § 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A) and (B).

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Petitioner Brentley Coates respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (App., *infra*, 1a-5a) are not reported. The opinions of the district court (App., *infra*, 6a-24a) are not reported.

JURISDICTION

The court of appeals denied rehearing of the appeal and entered its judgment on April 13, 2006 (App., *infra*, 1a-2a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 404(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1104(a) (App., *infra*, 25a-26a). Section 409 of ERISA, 29 U.S.C §1109 (App., *infra*, 27a). Section 502(a)(2) of ERISA, 29 U.S.C. §1132(a)(2) (App., *infra*, 28a). Department of Labor – Part 2550, Rules and Regulations for Fiduciary Responsibility, 29 C.F.R. §2550.404(a)-1 (App., *infra*, 29a-31a)

STATEMENT

Plaintiff-Petitioner Brentley Coates invoked the jurisdiction of the district court under section 502 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1132, and under 28 U.S.C § 1331 (general federal question jurisdiction). He sued on behalf of

the plan pursuant to ERISA section 409, 29 U.S.C. §1109, but the fiduciary breaches alleged adversely affected only a discrete subset of plan participants: those over the age of 55 whose individual account balances were transferred by the plan's fiduciaries, pursuant to a directive by the plan sponsor, from a portfolio of fixed-income securities into one overwhelmingly invested in equities. He alleged that the Plan's fiduciaries should have declined to follow the plan sponsor's amendment of the plan instrument because it required them to breach their fiduciary duties to him and his class of similarly situated older participants who had invested their retirement assets in the fixed income investment option.

Upholding the district court's order dismissing the action under Fed. R. Civ. P. 12(b)(6), the Ninth Circuit Court of Appeals held that the plan sponsor's decision to eliminate the fixed income option, "Fund B," was not subject to the fiduciary standards of ERISA section 404 and that Defendants did not breach any duties by following the terms of the plan amendment. App., *infra*, 4a. The court also held that Defendant fiduciaries' "duties ran to the plan as a whole, not to any subset of beneficiaries, because fiduciaries are required 'to take impartial account of the interests of all beneficiaries.'" *Id.*, citing *Varity Corp. v. Howe*, 516 U.S. 489, 514 (1996). The Court also cited 29 C.F.R. §2550.404a-1 as "describing [a] fiduciary's duties in reference to the plan as a whole." App., *infra*, 4a.

More than half of all pension assets in the United States are now held by individual account plans.[1] Participants in these plans now vastly outnumber those who participate in traditional defined benefit plan.[2]

If not overruled, the Ninth Circuit's decision will undermine the fiduciary's duty under ERISA § 404(1)(D), 29 U.S.C. § 1104(a)(1)(D), to decline to follow the terms of a plan if following them would require the fiduciary to breach his fiduciary duties. The Ninth Circuit's decision holds that ERISA plan participants may not obtain losses for fiduciary breaches which harm subsets of participants but not "all participants" or the plan itself. ERISA individual account plan participants within the jurisdictions of the Third and Sixth Circuits, however, have the right to seek relief where the fiduciary's acts or omissions allegedly harm only a subset of a plan's participants. *See*, *Kuper v. Iovenko*, 66 F.3d 1447 (6th Cir. 1995); *In re Schering-Plough*, 420 F.3d 231 (3d Cir. 2005).

The Ninth Circuit's decision also impermissibly shields ERISA fiduciaries from the need to exercise any and all responsibility under section 404 simply because the plan

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[1] See Federal Reserve Board, *Flow of Funds Accounts of the United States: Flows and Outstandings First Quarter 2006*, Fed. Res. Statistical Release Z.1, at 113 (June 8, 2006)(indicating defined benefit plans as holding 1,916.5 billion in assets, and defined contribution plans as holding 2,868.7 billion in assets.)

[2] See *Bureau of Labor Statistics, U.S. Department of Labor, National Compensation Survey: Employee Benefits In Private Industry* at 6, (March 2005) (indicating that 42 percent of workers participate in defined contribution plans, and 21 percent participate in defined contribution plans.)

sponsor issued an instruction. This holding is contrary to those of the Third, Fifth, Sixth, and Tenth Circuits. *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978); *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995); *Kuper v. Iovenko*, 66 F.3d 1447 (6th Cir. 1995); *Laborer's Nat'l Pension Fund v. Northern Trust Quantitative Advisors, Inc.*, 173 F.3d 313, 322 (5th Cir. 1999).

Petitioner was a long-term employee of Defendant Hewlett-Packard ("HP") and then its spin-off company, Defendant Agilent Technologies, Inc. ("Agilent"). Excepts of Record filed with the Court of Appeal ("ER") at pp. 44, 47. As such, he was a participant in the Hewlett-Packard Deferred Profit Sharing Plan ("HP DPSP"), a deferred profit sharing plan qualified under Revenue Ruling 56-497. ER p. 47.

From its inception until the late 1980's, the HP DPSP required that the individual accounts of participants under age 55 be invested in "Fund A," a balanced fund consisting of investments in equities and bonds. ER pp. 47-48. However, for participants over age 55, the Plan mandated that a fraction of his or her account be transferred from Fund A to Fund B, a fixed-income fund, such that by the time the participant turned age 65, all of his or her account balance would be invested in Fund B (the "asset transfer rule"). By this mechanism, the fiduciaries of the HP DPSP sought to protect its older participants from the higher risk associated with Fund A as they approached retirement age. ER p. 48.

Sometime before 1990, the HP DPSP revoked the mandatory aspect of the asset transfer rule and, instead, offered a discretionary transfer procedure which allowed over age-55 participants to decide themselves, on an annual basis, the allocation of their account balances between Fund A and

Fund B. ER p. 49. Nevertheless, while the asset transfer rule became optional, HP and the HP DPSP provided financial seminars and educational information to Petitioner and his class throughout Petitioner's employment which emphasized the prudence of the reallocation model implemented by the asset transfer rule. ER p. 48. This educational information explained that for the older worker approaching retirement, the primary question is not the historic "long term" average performance of equities, but rather the average during the period the older worker or retiree is actually so invested. ER p. 48. Thus, this information stressed the importance of the phased reallocation of retirement assets for older workers as a means of minimizing the risk associated with the inherent price volatility of equities. ER pp. 48-49.

In 1993, HP froze the HP DPSP and ceased making contributions to it. ER p. 49. From then on, the value of each participant's individual account became solely a function of the earnings and losses it sustained from investing in the two funds made available to participants. *Id.* This rendered the ability to allocate plan accounts between Fund A and the less volatile Fund B particularly critical, especially for older participants. Moreover, the frozen DPSP accepted no new participants. *Id.*

As a result, the DPSP participant population, demographically, consisted of an unusually large proportion of rapidly aging employees – a characteristic that only became more pronounced over time. *Id.*

In October 1999, Petitioner, who was over age 55, elected to allocate 100% of his account balance to Fund B, the fixed-income fund, and his account was so invested by the Defendants. ER p. 49. On information and belief, there were approximately 1,500 DPSP participants with accounts

invested in Fund B at that time. Declaration of Janet E. Brown in Support of Plaintiffs' Opposition to Agilent's Motion to Dismiss First Amended Complaint ("Brown Decl.") at Exh. A; ER 64-65. Petitioner filed an identical declaration in opposition to HP's motion to dismiss the First Amended Complaint. Clerk's Record ("CR") # 35.

In May 2000, in conjunction with a spin-off of HP subsidiary Agilent as a wholly independent company, Agilent and HP, in their capacities as Plan fiduciaries, announced to the participants that HP and Agilent had established two separate DPSP plans (the "HP DPSP" and the "Agilent DPSP", jointly the "DPSP"), but that HP would continue "to manage" both plans' assets. ER pp. 49-50. However, in reality, the purported separation of the DPSP into two plans was cosmetic only; the two "plans" continued to operate and function *de facto* as a single plan for all practical purposes. *Id.*

The announcement also stated that with respect to both the HP and Agilent DPSPs, Defendants would eliminate Fund B as an investment option effective May 31, 2000. ER p. 50. Without detailed information – or indeed any specific citation whatsoever – Defendants claimed that "securities law" required the elimination of Fund B. *Id.* This claim was false, as no requirement of securities law (or any other legal requirement) mandated the elimination of Fund B. *Id.* In 1993, HP froze the HP DPSP and ceased making contributions to it. ER p. 49.

On May 31, 2000, account balances invested in fixed income securities were liquidated and automatically reinvested in Fund A, a "balanced" portfolio heavily overweighted in equities. *Id.* at ¶ 31; CR # 26; ER p. 50. This transfer of accounts from Fund B to Fund A was implemented

immediately, thereby converting overnight the Fund B participants' accounts from approximately 96% fixed-income investments to only 35.3% fixed-income investments. *See* Brown Decl. Exhibit B; CR # 34; ER pp. 67-80.

At the time of the May 2000 announcement, Defendants knew or should have known, inter alia, that:

- The participants in the DPSP at that time consisted of an unusually disproportionate number of employees age 55 and older (and that this demographic characteristic would become more and more pronounced over time);
- There would be no fresh infusions of employer or employee contributions into the frozen plan, and that therefore participants' retirement security depended wholly on the investment returns on existing accounts;
- The participants had been encouraged not only to invest in Fund B, but to increase the proportion of their account allocation in Fund B as they approached retirement;
- The immediate divestiture of the participants' fixed income account holdings and reinvestment into a primarily equity-based fund violated the precepts of Modern Portfolio Theory as applied to this particular participant population;
- The immediate reallocation of the participants' fixed income retirement assets rather than their periodic reinvestment on a cost-averaging basis imprudently exposed Appellant and his class to unnecessary volatility and risk of loss at the worst time possible -- just before their retirements; and,
- The investment structure of Fund A, without reallocation of its investments to reduce the potential for short-term volatility, was inappropriate for a

frozen group of aging participants, particularly the over-55 group constituting the class herein.

During April 2000 – just prior to the May 2000 announcement described above — there was a series of email communications between an individual named Elizabeth Obershaw, on information and belief an employee of HP acting on behalf of HP in its fiduciary capacity, and William Sharpe, on information and belief a professor at Stanford University and an investment consultant retained by the DPSP, regarding the elimination of Fund B as an investment option for DPSP participants. *See* Brown Decl. Exhibit A; ER pp. 64-65. These communications demonstrate that Defendants knew the potential problems arising from the elimination of Fund B and that Defendants were aware of how the transfer would adversely affect those 1500 plan participants with assets invested in Fund B. The communications further demonstrate that, despite their knowledge of these problems and the potential consequences, Defendants chose to ignore their own concerns about the prudence of these investments.

Petitioner filed a timely notice of appeal to the Court of Appeals for the Ninth Circuit on December 11, 2003. ER 90-92. After oral argument, the court of appeals upheld the district court's decision on January 12, 2006. App., *infra*, 3a-5a. On April 13, 2006, the court of appeals denied Petitioner's timely motion for rehearing. App., *infra*, 1a-2a. Final judgment was entered on April 13, 2006. *Id.*

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant the Writ With Regard To The Question Of Whether A Subclass Of Plan Participants May State A Claim Under ERISA Section 502(a)(2).

As described above, Petitioner sought relief to the plan for alleged breaches of fiduciary duty that affected some, but not all, of the plan participants' accounts. The Ninth Circuit therefore concluded that Petitioner failed to state a claim under ERISA section 502(a)(2), reasoning that "Defendants' duties ran to the plan as a whole, not to any subset of beneficiaries, because fiduciaries are required 'to take impartial account of the interests of all beneficiaries.'" App., *infra*, 4a, citing *Varity Corp. v. Howe*, 516 U.S. 489, 514 (1996).

In holding that a subset of beneficiaries cannot state a claim under section 502(a)(2), the Ninth Circuit has taken a position contrary to that of several other Courts of Appeal. Conflict over this important issue undermines ERISA's national enforcement scheme. Accordingly, this Court should grant *certiorari* to review this Question Presented.

A. The Courts of Appeal Are Divided Over This Question.

Although the Ninth Circuit cited to this Court's decision in *Varity* in denying Petitioner's appeal, the "plan as a whole" language that provided the foundation for its reasoning originates from another decision of this Court, *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985).

In *Russell*, this Court held that the plaintiff therein lacked standing to bring a claim under sections 409 and 502(a)(2) for

a violation of fiduciary duty, where she sought to recover punitive damages allegedly caused by the denial of her benefits under the plan. In examining the remedial provisions of ERISA, this Court held that suits under section 409 must "be brought in a representative capacity *on behalf of the plan as a whole*." *Id.* at 142, n.9 (emphasis added).

Much has been made of the phrase "plan as a whole" since this decision was issued. The phrase does not appear anywhere within the text of ERISA or its related regulations.[3] However, from these four words, several important and frequently repeating issues have emerged, and the Circuits have widely varied in their interpretations of them. One of these issues centers on the question of whether a claim under ERISA section 502(a)(2) may be brought "on behalf of the plan" even if the fiduciary violations complained of were directed at a subclass of plan participants rather than toward all plan participants equally.

The Sixth and the Third Circuits have answered this question in the affirmative. In *Kuper v. Iovenko*, 66 F.3d 1447 (6th Cir. 1995), the defendants relied upon *Russell* to argue that a subclass of plan participants had no standing to seek recovery on behalf of a plan under § 409. The Sixth Circuit rejected this argument, stating that:

> Defendants' argument that a breach must harm the entire plan to give rise to liability under § 1109 would insulate fiduciaries who breach their duty so long as

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[3] The Ninth Circuit in its decision in the instant action cited 29 C.F.R. §2550.404a-1 as "describing [a] fiduciary's duties in reference to the plan as a whole." However, the regulation says nothing of the sort.

> the breach does not harm all of a plan's participants. Such a result clearly would contravene ERISA's imposition of a fiduciary duty that has been characterized as "the highest known to law."

Id. at 1453 (citations omitted.). The Third Circuit has adopted a similar position. *In re Schering-Plough Corporation ERISA Litigation*, 420 F.3d 231 (3d Cir. 2005).

The Fifth Circuit, in contrast, recently grappled with the same issue but suggested the opposite conclusion: that a fiduciary may *not* be liable for fiduciary breaches that are directed only at a particular subset of participants. *Milofsky v. American Airlines, Inc.*, 404 F.3d 338 (5th Cir. 2005). However, this decision was vacated *en banc* (442 F.3d 311 (5th Cir. 2006)) and remanded to the district court for further proceedings, so the state of the case law in that circuit is unclear.

The Ninth Circuit decision in this case, however, squarely rejects the position of the Sixth and Third Circuits. By holding that Petitioner cannot assert a claim under section 502(a)(2) on behalf of the plan because the alleged fiduciary violations affected only Petitioner's subclass of participants, the Ninth Circuit has created a clear conflict among the Courts of Appeal that should be resolved.

B. Circuit Conflict Over This Question Undermines ERISA's National Enforcement Scheme.

The Secretary of Labor, who is charged with interpreting and enforcing the provisions of Title I of ERISA, has described Petitioner's Question Presented as "an important and recurring issue." *See* the amicus brief filed by the Secretary of Labor in *Milofsky*, *supra*, ("*SOL Milofsky brief*")

at 1. Because her interests include "promoting uniformity of law, protecting beneficiaries, [and] enforcing fiduciary standards,"[4] the Secretary has consistently taken the position that participants in individual account plans, like Petitioner, may obtain relief to the plan under section 502(a)(2) of ERISA when the alleged violations affect some, but not all, of the plan participants' accounts. *SOL Milofsky brief*; *see also* the Secretary's amicus brief in *Schering-Plough*, supra ("*SOL Schering-Plough brief*").

In her amicus brief in *Milofsky*, the Secretary argued that "[i]t would be contrary to the intent and text of [ERISA sections 409 and 502(a)(2)] to hold that plan fiduciaries that violate ERISA's fiduciary standards are not liable simply because their violation did not affect the accounts of every single (or even most) plan participant." *SOL Milofsky brief* at 9. Similarly, in her amicus brief in *Schering-Plough*, the Secretary noted that there was "no basis for reading *Russell* so broadly that losses caused by fiduciary mismanagement, that significantly diminish the retirement security of participants or the amount of assets held in trust, cannot be recovered unless all of the participants are affected." *SOL Schering-Plough brief* at 6.

The Ninth Circuit decision herein, which diverges from both the law of other circuits and the position of the Department of Labor, undermines the national uniformity that forms the underpinning of ERISA's federal enforcement scheme. Accordingly, *certiorari* should be granted in this case to resolve this conflict.

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[4] *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682 (7th Cir. 1986)(*en banc*).

II. The Court Should Grant The Writ With Regard To The Question Of Whether A Fiduciary Has A Duty To Disregard Plan Terms If Those Terms Require Him To Violate His Fiduciary Duties.

In denying Petitioner's claim, the Ninth Circuit concluded that "Defendants had discretion in their role as plan sponsor to merge Fund B into Fund A." App., *infra*, 4a, citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999). Petitioner did not dispute that plan sponsor activities are not subject to ERISA's fiduciary standards. However, Petitioner contended that if following the terms of a plan would require a fiduciary to violate his fiduciary obligations under ERISA, the fiduciary must decline to follow those plan terms. Relying on *Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090, 1093 (9th Cir. 2004), the Ninth Circuit summarily rejected this fundamental notion. App., *infra*, 4a.

The position of the Ninth Circuit on this issue is directly at odds with the holdings in at least four other Circuits. The holding is also in conflict, in principle, with several decisions from this Court. Because this conflict implicates ERISA's most fundamental fiduciary standards, *certiorari* should be granted to review this question.

A. The Courts Of Appeal Are Divided Over This Question.

ERISA requires fiduciaries to discharge their duties "in accordance with the documents and instruments governing the plan *insofar as such documents and instruments are consistent with the provisions of [ERISA]."* 29 U.S.C. § 1104(a)(1)(D) (emphasis added). The position of the Ninth Circuit not only renders this provision of ERISA meaningless, but also conflicts with the established case law of the Tenth, Third,

Sixth and Fifth Circuits. *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978); *Moench v. Robertson*, 62 F.3d 553, 558 (3d Cir. 1995); *Kuper v. Iovenko*, 66 F.3d 1447 (6th Cir. 1995); and *Laborer's Nat'l Pension Fund v. Northern Trust Quantitative Advisors, Inc.*, 173 F.3d 313, 322 (5th Cir. 1999).

In *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978), the Tenth Circuit held that the trustees of employee stock ownership plans ("ESOPs"), which require the assets of a plan to be primarily or even totally invested in employer stock, are still subject to the prudence and loyalty duties set forth in ERISA, even though they are statutorily exempt from the diversification requirement: "The legislative history combined with a natural and clear reading of § 404, lead to the inexorable conclusion that ESOP fiduciaries are subject to the same fiduciary standards as any other fiduciary except to the extent that the standards require diversification of investments." *Id.* at 460. The court opined that the mere fact that a fiduciary has followed the express terms of the plan and invested in a manner which is "not inconsistent with any Specific prohibition of the Act," does not mean that the fiduciary "will be deemed to have met the 'exclusive benefit' and 'prudent man' requirements of s 404(a)(1)." *Id.* at 459.

In *Moench v. Robertson*, 62 F.3d 553, 558 (3d Cir. 1995), another ESOP case, the terms of the plan required the plan fiduciaries to invest primarily in employer stock. *Id.* at 558. As the company's financial situation began to decline, however, the plan fiduciaries continued to invest in company stock, despite repeated assertions from some corporation insiders that the plan should consider investing elsewhere. *Id.* at 558-9. The plan's participants sued for breach. Much like the court in the instant case, the district court had held that plaintiff had "failed to establish that [the Committee's] actions in directing the purchases of stock for the Plan were other

than in accordance with the requirements of the Plan or otherwise in violation of ERISA." *Id.* at 560. The Third Circuit reversed, noting that the defendants' argument was "inconsistent with ERISA inasmuch as it constrains the [fiduciary's] ability to act in the best interest of the beneficiaries." *Id.* at 567. The court cited *Eaves* with approval, noting that even though ESOPs are designed, in part, to limit fiduciaries' exposure to liability by removing the duty to diversify, there are circumstances where the duties of prudence and loyalty demand that an ESOP fiduciary defy the terms of the ESOP and invest the plans assets in the best interests of beneficiaries. *Id.* at 569-70. With that in mind, the court established a standard of review in which "an ESOP fiduciary who invests the assets in employer stock is entitled to a presumption that it acted consistently with ERISA by virtue of that decision. However, the plaintiff may overcome that presumption by establishing that the fiduciary abused its discretion by investing in employer securities." *Id* at 571.

The Sixth Circuit adopted the *Moench* standard in *Kuper v. Iovenko*, 66 F.3d 1447 (6th Cir. 1995), noting that "ERISA seeks to accomplish its goal of employee protection 'by requiring such plans to name fiduciaries and by giving them strict and detailed duties and obligations.'" *Id* at 1457, citing *Moench*, 62 F.3d at 560.

Kuper, *Moench*, and *Eaves* all involved ESOPs. However, both this Court and the Fifth Circuit have applied the principles embodied in those cases outside the ESOP context. In *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 568 (1985), this Court held that "trust documents cannot excuse trustees from their duties under ERISA, and...trust documents must generally be construed in light of ERISA's policies." *Id.*, citing ERISA § 404(a)(1)(D), 29 U.S.C.

§ 1104(a)(1)(D)); *see also Laborer's Nat'l Pension Fund v. Northern Trust Quantitative Advisors, Inc.*, 173 F.3d 313, 322 (5th Cir. 1999). The Court further noted that "trustees are understood to have all such powers as are necessary or appropriate for the carrying out of the purposes of the trust." *Central States*, 472 U.S. at 570.

In *Pegram v. Herdrich*, 530 U.S. 211 (2000), this Court elaborated on this reasoning in *dicta*, noting that:

> A plan might lawfully provide for a bonus for administrators who denied benefits to every 10th beneficiary, but it would be difficult for an administrator who received the bonus to defend against the claim that he had not been solely attentive to the beneficiaries' interests in carrying out his administrative duties.

Id. at 227, n.7.

By rejecting the line of authority discussed above to hold that a fiduciary is exempt from ERISA's fiduciary provisions when following the dictates of plan terms, the Ninth Circuit in this action has created a clear conflict within the Circuits.

B. Circuit Conflict Over This Question Undermines ERISA's National Enforcement Scheme.

As discussed above, the Secretary of Labor is charged with enforcing ERISA's standards and promoting uniformity of law. Here, as with Petitioner's first Question Presented, the Secretary has taken a position contrary to that of the Ninth Circuit on this issue.

The Secretary filed a brief as an *amicus curiae* during the appeal of *Tatum v. R. J. Reynolds Tobacco Co.*, 392 F.3d 636 (4th Cir. 2004), which presented a fact pattern analogous to that in Petitioner's case. In *Tatum*, after the plan sponsor amended the plan to require the sale of certain stocks held by the plan, the plan fiduciary followed the amendment and so sold the assets. The plaintiffs sued, claiming that "defendants breached their fiduciary duties under ERISA when they failed to exercise their discretion to maintain the Nabisco funds as investment options for Tobacco Plan participants." *Id.* at 6. Much like the Defendants in this case, defendants in *Tatum* argued that the plaintiff "fails to state a claim for breach of fiduciary duty under ERISA because the liquidation of the Nabisco funds (or stocks) in the Plan was a non-discretionary act required by the amendments." *Id.* at 7.

The Secretary of Labor argued in her *amicus* brief that, even if the plan terms could be interpreted to require the sale of the stock in question, fiduciaries had the duty to ignore those terms:

> While the act of amending the plan to require the sale of the stocks was a settlor function, the fiduciary's decision to sell the stocks in a block on January 31, 2000, was a fiduciary act subject to the duties of prudence and loyalty under ERISA section 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A) and (B). The plain import of section 404(a)(1)(D) is that a plan sponsor may not simply override ERISA's requirements. To the contrary, section 404(a)(1)(D) provides that the fiduciary must override plan provisions that are not in accordance with ERISA's requirements...If obeying a plan provision requires the fiduciary to act imprudently and disloyally in violation of ERISA section 404(a)(1)(A) and (B), 29 U.S.C.

> § 1104(a)(1)(A) and (B), the provision is not consistent with ERISA and the fiduciary has a duty to disregard it.

SOL Tatum Brief at 12, citing *Central States*, 472 U.S. at 568.[5]

Similarly, in her *amicus* brief in *Agway, Inc. Employees' 401(K) Thrift Investment Plan v. Magnuson*, 03 CV 1060 (NDNY 2004), the Secretary again noted that "fiduciaries have a duty under section 404(a)(1)(D) to decline to follow the terms of the plan document where those terms require them to act imprudently in violation of ERISA section 404(a)(1)(B)." *SOL Agway brief* at 9 (citing *Central States*, 472 U.S. at 568; *Fink v. Nat'l Sav. Bank and Trust*, 772 F.2d 951, 955-6 (D.C. Cir 1985)). The Secretary further cited "numerous recent cases recogniz[ing] that, under section 404(a)(1)(D), ERISA's requirement of prudence takes precedence over plan language."[6] *Id.* at 11. Finally, the Secretary opined that the "presumption of prudence" in *Kuper* and *Moench* is inapplicable to non-ESOP retirement plans, and a fiduciary's duty to disregard plan terms where prudence so requires remains applicable to retirement plan fiduciaries. *Id.* at 12-15.

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[5] While the Fourth Circuit found in favor of the plaintiffs in *Tatum*, the Court declined to reach the issue discussed herein.

[6] *Citing In re WorldCom, Inc.*, 263 F. Supp. 2d 745, 764 (S.D.N.Y. 2003); *In re Williams Co. ERISA Litig.*, 271 F. Supp. 2d 1328, 1343 (N.D. Okla. 2003); *Rankin v. Rots*, 278 F. Supp. 2d 853, 857 (E.D. Mich. 2003); *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 284 F. Supp. 2d 511, 549 n.51, 656 (S.D. Tex. 2003).

The Ninth Circuit decision herein, which diverges from both the law of other circuits and the position of the Department of Labor, undermines the national uniformity in ERISA's federal enforcement scheme. Accordingly, *certiorari* should be granted in this case to resolve this conflict.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-17306

[Filed April 13, 2006]

BRENTLEY COATES, individually and on behalf of a class of all other persons similarly situated, Plaintiff- Appellant,	)
v.	)
AGILENT TECHNOLOGIES, INC.; AGILENT TECHNOLOGIES, INC. DEFERRED PROFIT-SHARING PLAN; HEWLETT-PACKARD COMPANY; HEWLETT-PACKARD COMPANY DEFERRED PROFIT-SHARING PLAN, Defendants - Appellees.	)

Appeal from the United States District Court
for the Northern District of California
D.C. No. CV-03-00498-RMW
Ronald M. Whyte, District Judge, Presiding

Before: KOZINSKI and FERNANDEZ, Circuit Judges, and HATTER,* District Judge.

ORDER

The petition for rehearing and rehearing en banc is **DENIED**. *See* Fed. R. App. P. 35; Fed. R. App. P. 40.

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* The Honorable Terry J. Hatter, Jr., Senior United States District Judge for the Central District of California, sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-17306

[Filed January 12, 2006]

BRENTLEY COATES, individually and on behalf of a class of all other persons similarly situated, Plaintiff- Appellant,	)
v.	)
AGILENT TECHNOLOGIES, INC.; AGILENT TECHNOLOGIES, INC. DEFERRED PROFIT-SHARING PLAN; HEWLETT-PACKARD COMPANY; HEWLETT-PACKARD COMPANY DEFERRED PROFIT-SHARING PLAN, Defendants - Appellees.	)

Appeal from the United States District Court
for the Northern District of California
D.C. No. CV-03-00498-RMW
Ronald M. Whyte, District Judge, Presiding

MEMORANDUM*

Before: KOZINSKI and FERNANDEZ, Circuit Judges, and HATTER**, District Judge.

Defendants had discretion in their role as plan sponsor to merge Fund B into Fund A. "[A]n employer's decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate the employer's fiduciary duties which consist of such actions as administration of the plan's assets." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444, 119 S. Ct. 755, 142 L. Ed. 2d 881 (1999).

Defendants did not breach their fiduciary duties when they followed the express terms of the plan and merged the two funds. *See Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090, 1093 (9th Cir. 2004). Defendants' duties ran to the plan as a whole, not to any subset of beneficiaries, because fiduciaries are required "to take impartial account of the interests of all beneficiaries." *Varity Corp. v. Howe*, 516 U.S. 489, 514, 116 S. Ct. 1065, 134 L. Ed. 2d 130 (1996); *see* 29 C.F.R. § 2550.404a-1 (describing fiduciary's duties in reference to the plan as a whole). Plaintiff concedes that the merged fund was properly invested in a diversified investment portfolio, so he failed to state a claim for breach of fiduciary duty.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The Honorable Terry J. Hatter, Jr., Senior United States District Judge for the Central District of California, sitting by designation.

Plaintiff did not argue his misrepresentation claim in his opening brief. We therefore decline to consider it. *See* Fed. R. App. P. 28(a)(9)(A); *Kim v. Kang*, 154 F.3d 996, 1000 (9th Cir. 1998) ("[W]e 'will not ordinarily consider matters on appeal that are not specifically and distinctly argued in appellant's opening brief.'" (quoting *United States v. Ullah*, 976 F.2d 509, 514 (9th Cir. 1992) (citation and internal quotation marks omitted))).

AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

No. C-03-00498 RMW

[Filed December 10, 2003]

BRENTLEY COATES, individually and on behalf of a class of all other persons similarly situated, Plaintiff,	)
v.	)
AGILENT TECHNOLOGIES, INC.; AGILENT TECHNOLOGIES, INC. DEFERRED PROFIT-SHARING PLAN; HEWLETT-PACKARD COMPANY; HEWLETT-PACKARD COMPANY DEFERRED PROFIT-SHARING PLAN, Defendants.	)

JUDGMENT

On November 24, 2003, the court issued an order granting defendant's motion to dismiss pursuant to Fed. R.

Civ. P. 12(b)(6). This dismissal was made without granting leave to amend. Accordingly,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of defendant. This action is dismissed with prejudice.

DATED: 12/9/03

/s/ Ronald M. Whyte
RONALD M. WHYTE
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

No. C-03-00498 RMW

[Filed November 25, 2003]

BRENTLEY COATES, individually and on behalf of a class of all other persons similarly situated, Plaintiff,	)
v.	)
AGILENT TECHNOLOGIES, INC.; AGILENT TECHNOLOGIES, INC. DEFERRED PROFIT-SHARING PLAN; HEWLETT-PACKARD COMPANY; HEWLETT-PACKARD COMPANY DEFERRED PROFIT-SHARING PLAN, Defendants.	)

ORDER GRANTING AGILENT TECHNOLOGIES, INC.'S AND HEWLETT PACKARD'S MOTIONS TO DISMISS

Defendants Agilent Technologies, Inc. ("Agilent") and Hewlett-Packard Company ("HP") each filed a motion to dismiss plaintiff's first amended complaint ("FAC"). The motions were heard on November 7, 2003. For the following reasons, the court grants the motions to dismiss.

I. BACKGROUND

The central issue in this case is whether Agilent and HP breached their fiduciary duties to plaintiff under the Employment Retirement Investment Security Act ("ERISA"), when they implemented an amendment to an existing pension plan requiring the merger of two funds.

Plaintiff originally alleged that Agilent and HP breached their fiduciary duties under 29 U.S.C. § 1104(a)(1) when they amended their pension plan to eliminate Fund B and merged its participants into Fund A. Defendants filed motions to dismiss for failure to state a claim, which the court granted in its August 5, 2003 Order. (*See* Order Granting Agilent Technologies, Inc.'s Motion to Dismiss entered August 5, 2003) ("August 5th Order"). The August 5th Order granted ten days leave to file an amended complaint. *Id.* Pursuant to this order, plaintiff filed the FAC, which is the subject of the instant motion. An adequate description of the events underlying the liquidation of Fund B and transfer of the assets into the merged Fund A has been set out in the "Background" section of the August 5th Order. Only a brief summary of the salient facts is necessary at this point.

Plaintiff was an employee of HP from 1968 until June 2, 2000 when he became an Agilent employee after HP spun-off Agilent as an independent company. While an employee of HP, plaintiff participated in the HP Deferred Profit Sharing Plan ("HP DPSP"). Originally, the plan included two funds -

Fund A and Fund B. Fund A was a mix of equities and bonds. Fund B was a fixed income bond fund, and before 1990 workers older than 55 were required to place some or all of their contributions into Fund B as they neared retirement. However, sometime before 1990, HP amended the plan to allow plan beneficiaries older than 55 to choose in which fund to invest. Nevertheless, plaintiff, age 61, chose to invest 100% of his assets into Fund B.

After being spun-off, Agilent sponsored its own Deferred Profit Sharing Plan ("Agilent DPSP"). HP and Agilent transferred the HP DPSP accounts for Agilent employees, such as plaintiff, to the Agilent DPSP. Initially, the Agilent DPSP consisted of a Fund A and Fund B. However, under the terms of the plan, as of June 1, 2000, Fund B was merged into Fund A, leaving the Agilent DPSP with a single fund. Pursuant to these terms, on or around June 1, 2000 Agilent liquidated the approximately 1,500 Fund B accounts and transferred the assets into Fund A. Similarly, on May 1, 2000 HP implemented an amendment requiring the elimination of the HP DPSP Fund B.

In the August 5th Order, this court granted Agilent's motion to dismiss, but left open a specific issue. Specifically, the order states:

> If Agilent's ultimate investment decisions are prudent then it is irrelevant whether those investments are characterized as "Fund B" or as "Fund A." Plaintiff might have a claim against Agilent if, for instance, it alleged that Agilent acted imprudently in how it liquidated Fund B or in how it reinvested Fund B assets into other investments.

8/5/03 Order.

II. ANALYSIS

A. Plaintiff's New Claims

Plaintiff's primary argument is that because Fund B participants were employees nearing retirement, it was a breach of a defendants' fiduciary duties to merge those employees into a fund subject to short term volatility.[1] However, this argument was previously raised and rejected in the first motion to dismiss. Plaintiff's opposition to that motion to dismiss states:

> Plaintiff's claim arises from the Defendant fiduciaries' actions in *carrying out* the directive to liquidate the Fund B accounts of its older workers and to reinvest the proceeds in the higher risk Fund A.

(Opp. to Agilent filed 7/03/03.) In raising this argument again, plaintiff has not shown why the August 5th Order's rejection of that claim was erroneous.

Plaintiff contents the FAC has elaborated on the fiduciary duty claims by asserting that defendants (1) failed to reinvest plaintiff's account on a dollar cost averaging basis, (2) failed to obtain independent advice on the best method to merge the funds, and (3) failed to reallocate the assets of Fund A by increasing the percentage of fixed income investments to account for former Fund B participants' investment expectations. The August 5th Order held that the decision to merge the funds was made by HP and Agilent in their non-

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[1] The motivation plaintiff puts forth for the alleged breach of fiduciary duty was defendant's desire to save the administrative expense of maintaining Fund B, which had only 1500 participants.

fiduciary capacity as plan sponsors. *See* 8/5/03 Order at 2; *See Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 444 (1999) ("an employer's decision to amend a pension plan concern[ing] the composition or design of the plan itself . . . does not implicate the employer's fiduciary duties which consist of such actions as the administration of the plan's assets"). The plan sponsors also mandated that the funds be merged within one month. *Id.* Accordingly, in order to state a claim, plaintiff must allege a breach of a fiduciary duty in how the funds were merged, which he has failed to successfully do. Since HP and Agilent wear two hats as both the plan sponsors and the plan administrators, the differences in their obligations in each role must be recognized.[2] There is no fiduciary breach in making the decision to merge the funds, or requiring the merger be completed within one month because that was determined by the plan sponsors who have no fiduciary duty. Once these plan amendments were defined, it was up to the plan administrator, who does have a fiduciary duty, to execute the merger of the funds. As the August 5th Order explains, it is only in the execution of the predetermined merger that the plan administrators have a fiduciary duty. Plaintiff's allegations must be evaluated within this context.

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[2] The Supreme Court has explained that when a single entity acts as both the plan sponsor and the plan administrator there are clearly distinct duties upon it depending on which hat it was wearing when undertaking the challenged action. *See Lockheed Corp. v. Spink*, 517 U.S. 882, 891 (1996)(discussing ERISA's settlor-fiduciary distinction). To illustrate the separation in the required analysis, this court will refer to plan sponsor and plan administrator as if they were separate entities, although they both happen to be HP and Agilent.

B. Implementation of the Amendment

First, plaintiff claims it was a breach of fiduciary duty for the plan administrator to fail to reinvest Fund B accounts into Fund A on a dollar cost-averaging basis. This contention ignores the one month time-frame in which the plan sponsor had specified the merger be completed. More importantly, plaintiff fails to allege a causal connection between a loss in asset value and any failure to employ dollar cost averaging.

Next, plaintiff claims the plan administrators had a fiduciary duty to obtain independent advice regarding the best manner in which to merge the two funds. But an ERISA fiduciary duty only arises during the exercise of discretionary authority or control. *See Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996). Here, the plans sponsors' amendments required that Fund B accounts be promptly liquidated and completely reinvested into Fund A. Plaintiff has failed to set forth what issues required independent advise or how the administrators acted imprudently. Therefore, this allegation cannot support a claim for breach of fiduciary duty.

Finally, plaintiff alleges the merger of Fund B into Fund A, without reallocation of Fund A assets to decrease short term volatility, violated the precepts of Modern Portfolio Theory. At the outset, the court notes that plaintiff does not allege that the asset composition of Fund A in itself, violates the prudent man standard. It appears that plaintiff's true gripe is that assets in Fund A were not invested in accordance with the subjective desires of Fund B participants. Plaintiff claims upon information and belief that emails exist indicating that managers within defendants' organization were aware of the Fund B participants' investment goals but chose to ignore them. However, plaintiff cites no authority to show the plan

administrator had a fiduciary duty to reallocate fund assets to satisfy the expectations of a particular group of participants.

C. Propriety of Fund A

Plaintiff cites 29 C.F.R. § 2550.404a-1(b)(1), which states in relevant part, that a "fiduciary [must] give[] appropriate consideration to those facts and circumstances that, . . . the fiduciary knows . . . are relevant to the particular investment . . . including the role the investment or investment course of action plays in that portion of the plan's investment portfolio." Initially, this language, requiring consideration of the role the merger plays in that portion of the plan's investment portfolio, could indicate defendants had an obligation to consider the personal circumstances of the Fund B participants. However, further examination of this regulation demonstrates that is not the case. Subsection 2550.404a-1(b)(1)(a)(ii) states:

> [For purposes of section b(1) 'Appropriate consideration' shall include] the following factors as they relate to such portion of the portfolio:
> (A) The composition of the portfolio with regard to diversification;
> (B) The liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan; and
> (C) The projected return of the portfolio relative to the funding objectives of the plan.

The common focus of each of these factors is on the financial health of the plan. Nothing suggests the fiduciary must consider the individual needs of particular participants. In short, as long as the course of action is prudent for the plan participants as a whole, the fiduciary has satisfied its duty.

The above regulation does require that the plan administrator ensure that Fund A is properly diversified. Reinvesting plaintiff's account into an objectively imprudently administered fund would be a fiduciary breach because the asset allocation of that fund would be within the administrator's discretionary control. But if that were the case, all Fund A and former Fund B participants would have a claim. That is not the situation described in the FAC.

The August 5th Order explained that in order for plaintiff to state a claim, he must allege that the merged assets were imprudently invested or that Fund B assets were sold[3] and imprudently reinvested in the merged fund. Plaintiff's inability to allege that the overall composition of Fund A was imprudent is ultimately fatal to his case.

III. ORDER

The motions to dismiss plaintiff's first amended complaint are hereby granted without leave to amend since plaintiff cannot state a claim based upon the proposition that a separate Fund B had to be maintained or that the specific needs of particular beneficiaries as a whole, had to be addressed in the investment policy of the merged fund.

DATED: 11/24/03

/s/ Ronald M. Whyte
RONALD M. WHYTE
United States District Judge

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[3] The parties appeared to acknowledge in oral argument that assets of Fund B were not sold but rather transferred into a merged fund consisting of the Fund A and Fund B assets.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

No. C-03-00498 RMW

[Filed August 5, 2003]

BRENTLEY COATES, individually	)
and on behalf of a class of all other	)
persons similarly situated,	)
Plaintiff,	)
	)
v.	)
	)
AGILENT TECHNOLOGIES, INC.;	)
AGILENT TECHNOLOGIES, INC.	)
DEFERRED PROFIT-SHARING PLAN;	)
HEWLETT-PACKARD COMPANY;	)
HEWLETT-PACKARD COMPANY	)
DEFERRED PROFIT-SHARING PLAN,	)
Defendants.	)
	)

ORDER GRANTING AGILENT TECHNOLOGIES, INC.'S MOTION TO DISMISS

Defendant Agilent Technologies, Inc.'s ("Agilent") motion to dismiss was heard on July 25, 2003. For the following reasons, the court grants Agilent's motion.

I. BACKGROUND

This is a case under section 404 of the Employment Retirement Investment Security Act ("ERISA"). The central issue in this case is whether Agilent, and the other named defendants, breached their fiduciary duty to plaintiff when they implemented the terms of a retirement plan requiring them to liquidate investments in one fund and reinvest those proceeds in another fund.

Plaintiff Brentley Coates was an employee of Hewlett-Packard ("HP") and then its spin-off company, Agilent Technologies, Inc. ("Agilent"), between 1968 until April 2002. While an employee of HP plaintiff was entitled to participate in the HP Deferred Profit Sharing Plan ("HP DPSP"). Pursuant to the terms of the HP DPSP, HP made contributions to the individual accounts of participants each year until 1983, when the HP DPSP was frozen. Originally the plan included two funds--Fund A and Fund B. Fund A was a diverse mix of investments including equity and bonds. Fund B was a fixed-income bond fund. The HP DPSP originally mandated that for the accounts of employees under the age of 55 all of the contributions would be invested in Fund A. For workers older than 55, a certain percentage, and eventually all, of their contributions would be transferred into Fund B as they neared retirement. Sometime before 1990, HP amended the plan to allow plan beneficiaries over the age of 55 to choose in which fund to invest their contributions. Plaintiff chose to invest 100% of his assets in fund B.

On June 2, 2000, HP spun-off Agilent as an independent company. As part of the spin-off, Agilent sponsored its own Deferred Profit Sharing Plan ("Agilent DPSP"). This plan became effective May 1, 2000. HP and Agilent transferred the HP DPSP accounts for Agilent employees to the Agilent DPSP. Coates, who became an employee of Agilent as a result of the spin-off, became a participant in the Agilent DPSP.

Under the terms of the Agilent DPSP, Agilent is the "named fiduciary which has the discretionary authority to control and manage the operation and administration of the Plan, and is the 'administrator' of the Plan and the 'plan sponsor' as such terms are used in ERISA." The Agilent DPSP initially contained two investment funds, Fund A and Fund B. However, under the terms of the plan, as of June 1, 2000, Fund B was merged into Fund A and "no further [p]articipant investment elections" were permitted under the plan. Pursuant to these terms, on or around June 1, 2000, Agilent, liquidated Fund B and re-invested all of the proceeds in Fund A. Thereafter, the Agilent DPSP offered only one investment option.

Similarly, on May 1, 2000, HP amended the HP DPSP to provide for the elimination of Fund B as of June 1, 2000. Pursuant to the terms of the HP DPSP, on or about June 1, 2000 HP liquidated Fund B and re-invested all of the proceed in Fund A. Thereafter, the HP DPSP offered only one investment option.

Plaintiff filed an action in this court on February 3, 2003 on behalf of himself and others similarly situated. In his complaint, plaintiff alleges that Agilent and HP breached their fiduciary duties under 29 U.S.C. 1104 (a)(1) when they eliminated Fund B as an investment option. Agilent has filed

this motion to challenge the sufficiency of plaintiff's complaint. Agilent's main contention is that plaintiff cannot state a claim for breach of fiduciary duty against Agilent where the conduct at issue involves Agilent's design of the Agilent DPSP.

II. ANALYSIS

Plaintiff's complaint alleges that

> By their acts and omissions related to the forced liquidation of all Fund B fixed-income investments held by plaintiff had his class and the automatic re-investment of the proceeds of the liquidations into Fund A, the Defendants Agilent and HP . . . breached the fiduciary duties imposed upon them by ERISA § 404(a)(1).

In its motion to dismiss, Agilent argues that to the extent plaintiff's cause of action is aimed at Agilent's design of the Agilent DPSP, plaintiff fails to state a cognizable claim for relief because in designing the terms of the plan, including the terms that eliminated Fund B, Agilent was not acting as a fiduciary but as a plan sponsor or "settlor." After reviewing the relevant case law, the court finds that Agilent is correct.

In order to determine whether a party acted as a fiduciary, courts must look at the particular activity at issue. *See Systems Council EM-3 v. At& T Corp.*, 972 F.Supp. 21, 30 (D.D.C. 1997). It is well settled that employers or other plan sponsors are free under ERISA, for any reason at any time, to adopt, modify, or terminate the terms of a pension benefit plan. *See Lockheed Corp. v. Spink*, 517 U.S. 882, 890-91 (1996); *see also Hughs Aircraft Co. v. Jacobson*, 525 U.S. 432, 443-44 (1999).. "When employers undertake those actions, they do

not act as fiduciaries, but are analogous to the settlors of a trust." *Id.* (citations omitted). ERISA fiduciaries are allowed to wear more than one hat, and when employers make design changes in plans, they are not wearing their fiduciary hats. *Ames v. Amer. Nat. Can Co.*, 170 F.3d 751, 757 (7th Cir. 1999). "An employer is entitled to design a plan any way it likes, as long as it is willing to pay the cost (either directly or in terms of employee moral)." *Id.* For example, in *Lockheed Corp. v. Spink* the Supreme Court held that defendant Lockheed Corp., the plan sponsor and a plan fiduciary for an employee retirement plan, was not acting as a fiduciary when it amended the plan at issue to include new early retirement programs. 517 U.S. at 891.

In this case, it appears from the complaint that plaintiff is, at least in part, alleging that Agilent breached its fiduciary duty by designing the Agilent DPSP to include a provision that eliminated Fund B as an investment option. However, because Agilent was not acting as a fiduciary but as a plan "settlor" in designing the terms of the Agilent DPSP, plaintiff's claim must fail. Agilent's conduct in designing the Agilent DPSP is not subject to fiduciary review under ERISA.

Plaintiff attempts to salvage his complaint by arguing that his claim against Agilent is more limited in scope than defendant suggests. In his opposition to defendant's motion, plaintiff contends that his complaint does not implicate the design of the plans at issue but instead implicates the defendant fiduciaries' "power and obligation to veto the reckless reallocation of the older participants' retirement accounts into higher risk investments." In other words, plaintiff attempts to characterize his cause of action as being aimed solely at the defendants' failure to disobey and override the express terms of the benefits plans at issue.

In support of his argument, plaintiff relies on the theory that in certain situations, a plan administrator may have to disregard the express terms of a plan in order to fulfill its obligations under ERISA. To support this theory plaintiff first cites to *Pegram v. Herdrich*, 530 U.S. 211 (2000) and *Dardaganis v. Grace Capital Inc.*, 889 F.2d 1237 (2nd Cir. 1989). In *Pegram*, the Supreme Court looked at ERISA fiduciary duties imposed on physicians employed by Health Management Organizations ("HMO's"). 530 U.S. at 231. The Court held that physicians were not subject to ERISA fiduciary duties when making decisions related to treatment that also implicated eligibility for benefits. *Id.* However, in dicta, the court noted that

> It does not follow that those who administer a particular plan design may not have difficulty in following fiduciary standards if the design is awkward enough. A plan might lawfully provide for a bonus for administrators who denied benefits to every 10th beneficiary, but it would be difficult for an administrator who received the bonus to defend against the claim that he had not been solely attentive to the beneficiaries' interests in carrying out his administrative duties.

Id. at 227, n.7.

In *Dardaganis*, the Seventh Circuit found that a plan administrator breached its fiduciary duty by exceeding a cap that the express terms of the plan placed on equity investments. 889 F.2d at 1243. However, in its holding, the court suggested that the defendant could have raised a question of fact as to its liability if it had shown that complying with the terms of the plan would have been

imprudent. *Id.* The court noted that the defendant failed to make such a showing. *Id.*

Plaintiff relies on this dicta in support of the idea that in certain circumstances plan administrators can violate their fiduciary duties even though they are following the express terms of the plan. However, plaintiff's complaint does not contain allegations that give rise to such a claim. The cases on which plaintiff relies suggests that such a cause of action would only arise in extreme circumstances, in circumstances where the plan administrator is faced with the choice of either following the terms of the plan or fulfilling its obligations to the plan beneficiaries. The plaintiff's complaint does not present such a situation. There is nothing inherent in the decision to eliminate Fund B that would require Agilent to breach its duty to the plan beneficiaries. If Agilent's ultimate investment decisions are prudent then it is irrelevant whether those investments are characterized as "Fund B" or as "Fund A." Plaintiff might have a claim against Agilent if, for instance, it alleged that Agilent acted imprudently in how it liquidated Fund B or in how it re-invested the Fund B assets into other investments, but plaintiff's complaint, as it now stands, does not contain such allegations. As such, even if plaintiff's theory is valid, his complaint fails to state a claim.

Plaintiff also cites *Moench v. Robertson*, 62 F.3d 553, 569-72 (3d Cir. 1995) and other cases dealing with Employee Stock Ownership Plans ("ESOP's"), plans with terms requiring plan assets be invested primarily in company stock. In *Moench* the Third Circuit held that the ESOP fiduciary was entitled to a presumption in favor of purchasing employer stock, even as share values decline, but the presumption may be rebutted by a showing that the conduct of the fiduciary constituted an abuse of discretion. 62 F.3d 553, 571-72 (3rd Cir. 1995); *See also Kuper v. Iovenko*, 66 F.3d 1147 (6th Cir.

1995); *In re McKesson HBOC, Inc. ERISA Litig.*, 2002 WL 31431588 (N.D. Cal.) ("Assuming *Moench* and *Kuper* apply, then an ESOP fiduciary may not blindly follow an ESOP plan's directive to invest in company stock and may be liable for breach of fiduciary duty if such investment was imprudent."). In other words, for ESOP's, in certain circumstances plan administrators must use their discretion to disobey the express directives of the plan.

Plaintiff contends that like in ESOP cases he is entitled to allege and prove that the defendants' compliance with the plan directives violated ERISA. However, cases dealing with ESOP's are distinguishable from the case at bar. As discussed in *Kuper*, ESOP's create a unique situation under ERISA law. 66 F.3d at 1457-59. ESOP's are a special exception to the general requirements of diversification of investments under ERISA. *Id.* at 1457. However, as a matter of policy, ESOP's cannot not place a per se prohibition on diversification. *Id.* As such, there is a certain amount of discretion reserved to the plan administrator and inherent in the terms of ESOP's. *Id.* It is this discretion that is the focus of and subject to fiduciary review.

In the case at bar, the Agilent DPSP is not an ESOP and does not provide any discretion as to the elimination of Fund B. While the plan administrator may have some discretion in the mechanics of liquidating Fund B and the investment of the proceeds of Fund B, plaintiff's complaint does not make any allegations or challenges relevant to that activity. As such, plaintiff's claim, even if narrowed to defendants' refusal to disobey the terms of the plan, fails to state a claim.

III. ORDER

For the foregoing reasons, the court grants defendant's motion to dismiss with leave to amend. Plaintiff has 10 days from the date of the heating to file an amended complaint.

DATED: 8/1/03 /s/ Ronald M. Whyte
RONALD M. WHYTE
United States District Judge

APPENDIX F

STATUTORY AND REGULATORY PROVISIONS INVOLVED

TITLE 29. LABOR
CHAPTER 18. EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
PROTECTION OF EMPLOYEE BENEFIT RIGHTS
REGULATORY PROVISIONS
FIDUCIARY RESPONSIBILITY

29 U.S.C. § 1104

§ 1104. Fiduciary duties

(a) Prudent man standard of care.

(1) Subject to sections 403(c) and (d), 4042, and 4044 [29 U.S.C. §§ 1103(c), (d), 1342, 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in

a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and title IV.

(2) In the case of an eligible individual account plan (as defined in section 407(d)(3) [29 U.S.C. § 1107(d)(3)]), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 407(d)(4) and (5) [29 U.S.C. § 1107(d)(4) and (5)]).

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29 U.S.C. § 1109

§ 1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act [29 U.S.C. § 1111].

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this title if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

29 U.S.C. § 1132

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought--

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(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 U.S.C. § 1109];

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TITLE 29 -- LABOR
SUBTITLE B -- REGULATIONS RELATING TO LABOR
CHAPTER XXV -- EMPLOYEE BENEFITS SECURITY ADMINISTRATION, DEPARTMENT OF LABOR
SUBCHAPTER F -- FIDUCIARY RESPONSIBILITY UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974
PART 2550 -- RULES AND REGULATIONS FOR FIDUCIARY RESPONSIBILITY

29 CFR 2550.404a-1

§ 2550.404a-1 Investment duties.

(a) In general. Section 404(a)(1)(B) of the Employee Retirement Income Security Act of 1974 (the Act) provides, in part, that a fiduciary shall discharge his duties with respect to a plan with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

(b) Investment duties.

(1) With regard to an investment or investment course of action taken by a fiduciary of an employee benefit plan pursuant to his investmemt duties, the requirements of section 404(a)(1)(B) of the Act set forth in subsection (a) of this section are satisfied if the fiduciary:

(i) Has given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's

investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties; and

(ii) Has acted accordingly.

(2) For purposes of paragraph (b)(1) of this section, "appropriate consideration" shall include, but is not necessarily limited to,

(i) A determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio (or, where applicable, that portion of the plan portfolio with respect to which the fiduciary has investment duties), to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action, and

(ii) Consideration of the following factors as they relate to such portion of the portfolio:

(A) The composition of the portfolio with regard to diversification;

(B) The liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan; and

(C) The projected return of the portfolio relative to the funding objectives of the plan.

(3) An investment manager appointed, pursuant to the provisions of section 402(c)(3) of the Act, to manage all or part of the assets of a plan, may, for purposes of compliance with the provisions of paragraphs (b)(1) and (2) of this section, rely on, and act upon the basis of, information pertaining to the plan provided by or at the direction of the appointing fiduciary, if--

(i) Such information is provided for the stated purpose of assisting the manager in the performance of his investment duties, and

(ii) The manager does not know and has no reason to know that the information is incorrect.

(c) Definitions. For purposes of this section:

(1) The term investment duties means any duties imposed upon, or assumed or undertaken by, a person in connection with the investment of plan assets which make or will make such person a fiduciary of an employee benefit plan or which are performed by such person as a fiduciary of an employee benefit plan as defined in section 3(21)(A) (i) or (ii) of the Act.

(2) The term investment course of action means any series or program of investments or actions related to a fiduciary's performance of his investment duties.

(3) The term plan means an employee benefit plan to which title I of the Act applies.